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THE UNIFORM TRUSTS ACT*

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The National Conference of Commissioners on Uniform State Laws adopted a Uniform Trusts Act at their meeting held at Kansas City, Missouri, on September 20-25, 1937. Work on this Act began in 1931 and the six successive drafts through which it passed were subjected to the scrutiny of many agencies including committees of the American Bar Association, the Illinois and Minnesota Bar Associations, Association of American Law Schools, and others. A prefatory note to the Act states its purpose to be "(1) To do away with a few obsolete and unjust rules of trust law which have come about through unfortunate judicial decisions or are survivals of ancient property law; (2) To clarify and tighten the rules regarding loyalty by a trustee to the interests of his beneficiary; (3) To relax a few equity rules regarding trust administration, under careful restriction, in order to facilitate convenience in the administration of trusts." The Act, then, is in no sense a comprehensive trust code but rather comprises several largely unrelated sections each dealing with specific problems. It is not, therefore, essen-

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tial that it should be adopted in any state as a unit, and any section or sections could be omitted from the act without serious danger to any continuity or unity. The only sacrifice such omissions would occasion would be in uniformity, a sacrifice not to be too lightly made.

The legislature of Ohio has passed many of the uniform laws adopted by the Commissioners on Uniform State Laws, and this new proposal will undoubtedly come before it for consideration. The purpose of this article is to study the Act with reference to the existing case and statute laws of Ohio in order to present the changes which would be entailed in its adoption. The study will be made under the three purposes suggested in the prefatory note of the Commissioners and in the order above stated.

I. REMOVAL OF OBSOLETE OR UNJUST RULES

Section 2

1. Whenever a bank account shall, by entries made on the books of the depositor and the bank at time of the deposit, be created exclusively for the purpose of paying dividends, interest or interest coupons, salaries, wages, or pensions, or other benefits to employees, and the depositor at the time of opening such account does not expressly otherwise declare, the depositor shall be deemed a trustee of such account for the creditors to be paid therefrom, subject to such power of revocation as the depositor may have reserved by agreement with the bank.

2. If any beneficiary for whom such trust is created does not present his claim to the bank of payment within one year after it is due, the depositor who created such trust may revoke it as to such creditor.

The primary purpose of this section is to do away with the diversity which exists in the case law as to the status of these special accounts. When a corporation opens a coupon account in its bank to meet maturities of interest coupons on its bonds, it has been held that the *bank* becomes a trustee of the depos-

ited funds for the purpose of paying the claimants.¹ Other authorities view the bank only as a debtor of the depositor corporation in such cases.² Some courts regard the corporation as trustee of an account it creates to pay dividends³ but not of an account created to pay interest coupons.⁴ The distinction appears unwarranted.⁵ In each case the corporation owes a debt, created by issuing the bonds or declaring the dividend, and is setting aside some of its property to pay it. In neither case is the bank properly regarded as a trustee, but rather as the debtor of its depositor. The intention of the ordinary depositor, in the light of established banking practice, is presumably that the bank is free to use the funds deposited for its own purposes. The depositor, however, by opening such an account, seems to designate one of its assets, *i.e.*, the claim against the bank arising from the deposit, to be used for the sole purpose of paying the particular class of its creditors. Hence the depositor holds the claim in trust for them.⁶ Similar reasoning applies to other

¹ *Portland Bldg. Co. v. State Bank of Portland*, 110 Ore. 61, 222 Pac. 740 (1924). In *Diebold Safe and Lock Co. v. Fulton*, 49 Ohio App. 516 (1934), the Company had a special payroll account in its bank. A fund was given to the bank to meet a particular payroll, no deposit in the account being directed. An uninformed teller made the deposit in the special payroll account. The bank failed and the court held the deposit to be a trust fund, Sherick, P. J., saying: "It is a generally accepted rule that where there is a deposit in a bank for the special purpose of meeting certain checks, or a class of checks, and the bank has full knowledge of this purpose, and the special account is used for no other purpose, the account is not a general deposit in which title thereto passes to the bank and the relationship of debtor and creditor (is) established, but such is a special deposit . . . and is a fund impressed with a trust, and, upon the bank's insolvency, such deposit is entitled to preference over the bank's general creditors. . . ." In *Kopp Clay Co. v. Fulton*, 125 Ohio St. 512, 182 N.E. 494 (1932), while the fact was not in issue, the court seems to consider a deposit in a special payroll account as a special deposit.

² *Fralick v. Coeur D'Alene Bank*, 36 Idaho 108, 210 Pac. 586 (1922), two judges dissenting; 32 Yale L. J. 851 (1923).

³ *In re Interborough Consol. Corp.*, 267 Fed. 914 (D.C.N.Y., 1920).

⁴ *In re Interborough Consol. Corp.*, 288 Fed. 334 (C.C.A. 2nd, 1923). Compare *Guidise v. Island Refining Corp.*, 291 Fed. 922 (D.C.N.Y., 1923).

⁵ See 19 Ill. L. Rev. 429 (1925); 35 Yale L. J. 634 (1926). Compare 28 Col. L. Rev. 477 (1928).

⁶ 1 BOGERT, TRUSTS AND TRUSTEES (1935) sec. 20.

types of purpose accounts, such as special accounts to pay employees wages, pensions, or other benefits.⁷ Section 2 therefore adopts the solution closest to banking realities and the normal intention of the parties. The bank in which such accounts are established does not become trustee of the funds deposited. This is so whether or not the same bank happens to be trustee of other property transferred to it by the depositor to secure obligation held by the particular class of the depositor's creditors, *e.g.*, bondholders.⁸ The clause in the section, "and the depositor at the time of opening such account does not expressly otherwise declare," makes it possible for the parties, depositor and depositary, to stipulate that the latter should be trustee, or that neither party should be.

The existence of the power of the depositor to revoke the trust and thereafter to use the balance of the account for other purposes is rightly made a fact question by the last sentence of the first subsection. Even though such power to revoke has not been reserved, the expiration of the one-year period of limitation in the second subsection gives the depositor such power as to the unclaimed balance. In either event, of course, these provisions do not mean that the claimant loses his position as general creditor of the depositor. They simply give the depositor power to destroy the standing of the creditor as beneficiary by revoking the trust. Since this subsection gives the claimant one year to "present his claim to the *bank*," it seemingly applies in two cases: (1) where the bank disburses as fiscal agent of the depositor-trustee; and (2) where the depositor itself disburses by check on the account and presentment of the check to the drawee bank is not made within the period.

⁷ Bogert, *op. cit.*, *supra*, note 6. Compare *Diebold Safe & Lock Co. v. Fulton*, *supra*, note 1.

⁸ *Guidise v. Island Refining Corp.*, *supra*, note 4; *Fralick v. Coeur D'Alene Bank*, *supra*, note 2. But the indenture creating the bank trustee for security may govern the relationship as to funds deposited with the same bank to meet interest payments. See *Steel Cities Chemical Co. v. Virginia-Carolina Chemical Co.*, 7 F. (2nd) 280 (C.C.A. 2nd, 1925) and discussion, 35 Yale L. J. 634, 635 (1926).

When a depositor has furnished his bank with funds to see a creditor paid, the problem of the relations of depositor, creditor, and bank arises most frequently after either depositor or bank has failed. In case either goes insolvent, has the creditor been elevated to the preferred position of beneficiary with the insolvent as trustee? Section 2 settles the question as to the types of creditors listed therein, affirming their position as beneficiaries of the account upon insolvency of the depositor and therefore inferentially denying it as to the funds deposited upon insolvency of the bank. But even as to the types of creditors named in the section the statute only settles the question when "a bank account shall . . . be created exclusively" for purpose of paying them. The words, "*bank account*" and "*created*" are capable of two constructions. They may be strictly construed only to cover cases where a special account is opened by the depositor; or they may be broadly construed to include any case in which the bank is provided by its depositor with funds to pay the classes of creditors named in the statute. In a leading Ohio case⁹ a depositor drew its check on a general account which it maintained on the commercial side of a Bank and Trust Company, and sent it to the trust department of the same bank to be used in meeting principal and interest maturities. The trust department put the check through and was credited by the commercial department under "Uninvested Trust Funds," apparently a general ledger account maintained by the trust department. After failure of the Bank and Trust Company it was held that the transaction made the institution trustee of the funds,¹⁰ but the court approved and followed a previous Ohio case¹¹ holding that a deposit of trust funds by the trust department in the commercial department, permitted by section 710-165 of the Ohio Banking Act, created the relation of debtor-creditor,

⁹ *Fulton v. University of Dayton*, 129 Ohio St. 90, 193 N.E. 758 (1934).

¹⁰ The security indenture contained provisions strengthening this conclusion. 129 Ohio St., at p. 95.

¹¹ *McDonald v. Fulton*, 125 Ohio St. 507, 182 N.E. 504 (1932).

just as if the trustee properly made a general deposit in another bank.¹² Hence the depositor was not entitled to preferential payment. A subsequent amendment of section 710-165¹³ probably changes this result. That self-deposit statute now provides that when such funds are so deposited, if the institution fails its assets shall be impressed with a trust for payment of the deposit. Such deposit transactions as this, if they have for their purpose the payment of claimants listed in Section 2, may be construed to come within its provisions. If so, there will be no incompatibility between that section and the Ohio self-deposit statute. By Section 2 the sending of funds will not make the bank of trustee unless express declarations to the contrary are made by the depositor. Hence the amended Section 710-165 of the Banking Act will ordinarily be inapplicable, since the bank will not be depositing trust funds in another department of the bank.¹⁴ If, however, the depositor makes a contrary declaration, as provided in Section 2 the bank may be a trustee of the funds. In such an event a self-deposit would, under the amended section of the Banking Act, result in a preference. It is believed, however, that Section 2 of the Uniform Act was not intended to be construed to include furnishing of funds to a bank for the purposes named unless an account is thereby literally created for that exclusive purpose. The relations fixed by the section, *i.e.*, the bank as debtor of the depositor and the depositor as trustee of the bank's obligation for the claimant, are not intended to arise unless that is done. Both an adherence to the exact wording of the section and a reading of the section as a whole justifies this conclusion.

¹² *Fulton v. Main*, 128 Ohio St. 457, 191 N.E. 742 (1934).

¹³ 115 Ohio Laws 287 (effective June 14, 1933).

¹⁴ "We are primarily concerned with the last sentence of this section. *It is dealing with the subject of moneys held by any trust company in trust, that is, as a trustee*, and in language that is clear and concise authorizes it to deposit money pending distribution or investment in the commercial or other department of the bank. We need give attention to the first part of the section only for the purpose of observing the express distinction made between property and securities on the one hand, and money, on the other. The former are to be segregated and kept so." *McDonald v. Fulton, supra*, 125 Ohio St. at p. 510. (Italics by the writers).

Whichever of the above constructions is made of Section 2, it is clear that the Act fixes the relations of depositor, creditor and bank in comparatively few of the fact situations in which such three-party problems arise. The Act has for its primary purpose only the abolition of "a few obsolete and unjust rules of trust law," *i.e.*, in Section 2 the doing away with the distinction between the relationships in coupon and dividend accounts. Its provisions were extended to cover accounts to pay benefits to employees on the theory that they were governed by the same considerations. Other fact situations which may or may not deserve similar treatment, are left untouched, as, for example, deposits to meet the principal of the depositor's bonds or notes,¹⁵ to accomplish payment of the depositor's rent,¹⁶ to pay the purchase price of material sold by a dealer to the depositor,¹⁷ to procure foreign or domestic credit to meet outstanding drafts or other obligations of the depositor,¹⁸ and such transactions,¹⁹ whether the deposit is made by the obligor sending funds to his bank to have the bank perform the task for him,²⁰ or is made by the depositor sending an order to his bank to use for the stipulated purpose a portion of the sum already standing to his credit in a general account.²¹ The problem of whether the cred-

¹⁵ The section being confined to creation of accounts to pay "interest or interest coupons."

¹⁶ See *Fulton v. Gardiner*, 127 Ohio St. 77, 186 N.E. 724 (1933).

¹⁷ See *Pontius v. Sears, Roebuck & Co.*, 16 Ohio App. 240 (1922).

¹⁸ See *Equitable Trust Co. v. First National Bank*, 275 U.S. 359, 72 L. Ed. 313, 48 S. Ct. 167 (1928). SCOTT, CASES ON TRUSTS (2nd Ed.) pp. 59-69 and cases cited.

¹⁹ See *Squire v. Branciforti*, 131 Ohio St. 344, 2 N.E. (2nd) 878 (1936) (vendee deposited funds with bank as escrow agent in purchase of real estate).

²⁰ Where this is the case, the problem of whether the bank is trustee depends on whether it is intended to use the particular funds deposited solely for the purpose specified, or is intended to be free to use the particular funds as its own, merely promising the depositor to perform the task. See RESTATEMENT, TRUSTS (1935) sec. 12, com. (g); Stone, Some Legal Problems Involved in the Transmission of Funds, 21 Col. L. Rev. 507 (1921); 6 Minn. L. Rev. 306 (1922).

²¹ Where this is the case, assuming the intention to have a trust is present, in deciding whether the bank is trustee, the chief problem is whether the

itor has the additional status of trust beneficiary upon the insolvency of either depositor or depository²² in such other borderline trust-debt cases remains one to be solved by application of common law and banking principles.

Section 15

Where a person who is a trustee of two or more trusts has mingled the funds of two or more trusts in the same aggregate of cash, or in the same bank or brokerage account or other investment, and a withdrawal is made therefrom by the trustee for his own benefit, or for the benefit of a third person not a beneficiary or creditor of one or more of the trusts, or for an unknown purpose, such a withdrawal shall be charged first to the amount of cash, credit, or other property of the trustee in the mingled fund, if any, and after the exhaustion of the trustee's cash, credit, or other property, then to the several trusts in proportion to their several interests in the cash, credit, or other property at the time of the withdrawal.

The purpose of this section is obviously to prevent the application of the rule in *Clayton's Case*²³ in fixing the loss when a trustee of two or more trusts has mingled the properties and has subsequently withdrawn parts of the commingled mass and dissipated the properties withdrawn. While the authorities are not in harmony,²⁴ a number of cases, notably in the Federal courts, have applied the Clayton Rule in this situation.²⁵ This has placed the loss in accordance with the rule of thumb of "first money in is first money out," resulting in an allocation in the

bank has segregated, from its general assets, a *res* which it may hold in trust. See Dixon, *Trust or Debt? Delivery of a Check to the Trust Department of the Drawee Bank*, 9 Cin. L. Rev. 169 (1935); *Fulton v. University of Dayton*, *supra*, note 9; Scott, *Cases on Trusts* (2nd Ed.) pp. 49-56 and cases cited; RESTATEMENT OF TRUSTS, sec. 87.

²² On the position of the creditor as trust beneficiary or contract beneficiary, see Stone, *op. cit.*, *supra*, at pp. 508, 524-5; *Pontius v. Sears, Roebuck & Co.*, *supra*, note 17; BOGERT, TRUSTS AND TRUSTEES (1935), sec. 21, pp. 94, 96.

²³ *Devaynes v. Noble*, 1 Merivale 572, 35 Eng. Rep. 78 (1816).

²⁴ See cases collected in BOGERT, TRUSTS AND TRUSTEES, sec. 927.

²⁵ See particularly *In re Bolognesi & Co.*, 254 Fed. 770 (1918); *In re Walter J. Schmidt & Co.*, 298 Fed. 314 (1923). Compare *Cunningham v. Brown*, 265 U.S. 1, 13, 68 L. Ed. 693, 44 Sup. Ct. 424 (1924).

inverse order of making the deposits in the commingled fund. Such a position is manifestly unfair to the group of beneficiaries whose property merely chanced to be deposited at an earlier time. No reason appears why the loss should not be prorated among the equally innocent groups of trust beneficiaries according to the interests which their respective trusts had in the mass at time of the trustee's withdrawal. Not merely one group, but all of them, were unfortunate in having a defaulting trustee. Hence the utilization of the rule in *Clayton's Case* in this situation has met with deserved criticism,²⁶ and the position adopted by section 15 has been approved by the American Law Institute.²⁷ The passage of the section would involve no change in the Ohio law. There is no direct decision in this state involving the problem, but in one case²⁸ there is a strong dictum favoring the proportionate adjustment provided for in the Act. To pass this section would be a simple method of assuring a fair solution of the problem in Ohio.

Section 16

1. When an interest in real property is conveyed by deed to a person on a trust which is unenforceable on account of the Statute of Frauds and the intended trustee or his successor in interest still holds title but refuses to carry out the trust on account of the Statute of Frauds, the intended trustee or his successor in interest, except to the extent that the successor in interest is a bona fide purchaser of a legal interest in the real property in question, shall be under a duty to convey the interest in real property to the settlor or his successor in interest. A court having jurisdiction may prescribe the conditions upon which the interest shall be conveyed to the settlor or his successor in interest.

2. Where the intended trustee has transferred part or all of his interest and it has come into the hands of a bona fide purchaser, the

²⁶ Scott, "The Right to Follow Money Wrongfully Mingled with Other Money." 27 Harv. L. Rev. 125 at 130 (1913). See comments, 32 Yale L. J. 267 (1922); 28 Harv. L. Rev. 193 (1914); 10 Cin. L. Rev. 278, 284 (1936).

²⁷ RESTATEMENT OF TRUSTS, sec. 202, Comment (n) (1935).

²⁸ *Schutt v. Bates*, 33 Ohio App. 303 (1929).

intended trustee shall be liable to the settlor or his successor in interest for the value of the interest thus transferred at the time of its transfer, less such offsets as the court may deem equitable.

This section adopts the minority view in the United States on the question involved so far as the court decisions are concerned.²⁹ The position taken, however, is one approved by eminent scholars,³⁰ and requires restitution to the settlor or his successors in all cases, instead of awarding the property to the intended beneficiaries by the imposition of a constructive trust for them.³¹

The section makes no distinction between cases in which the trustee acted in good faith when he received the deed upon oral trust for a third party and cases in which he was guilty of actual fraud, undue influence and the like in the acquisition of the property. In the latter situation the writers believe that much is to be said for the result that the oral trustee should be compelled to hold for the third party, against whom it seems the wrong is actually committed,³² and in whose favor many courts have raised a constructive trust.³³ However, a strong case has been made for restitution to the settlor even in that situation.³⁴ Since the major problem is whether the oral trustee shall be allowed to retain the land, and the section correctly provides that he shall not do so, it may be desirable to have a clear and definite result and not to have the provision laden with exceptions.

Since the Ohio Legislature has never passed statutes equiv-

²⁹ BOGERT, *op. cit.*, sec. 495, where the cases are collected.

³⁰ Ames, "Constructive Trusts Based upon a Breach of Express Oral Trust of Land." 20 Harv. L. Rev. 549 (1907). Scott, "Conveyances upon Trusts Not Properly Declared." 37 Harv. L. Rev. 653 (1924). Stone, "Resulting Trusts and the Statute of Frauds," 6 Col. Law Rev. 326 (1906). BOGERT, *op. cit.*, sec. 497.

³¹ See Costigan, "Trusts Based on Oral Promises to Hold in Trust to Convey or to Devise Made by Voluntary Grantees," 12 Mich. Law Rev. 430 (1914).

³² Scott, *op. cit.*, 37 Harv. L. Rev. at 667-8.

³³ BOGERT, *op. cit.*, secs. 495-6.

³⁴ BOGERT, *op. cit.*, pp. 1597-1599.

alent to Section VII of the English Statute of Frauds, which required the creation of trusts of land to be manifested and proved by a writing, the problem involved in Section 16 does not arise in Ohio. The absence of a Statute of Frauds respecting trusts has made it possible for our courts frequently to engraft an oral trust onto an absolute deed of real property where the evidence is "clear and convincing."³⁵ Accordingly, this section should be omitted in case the Ohio Legislature passes the Uniform Act.

The section under consideration only covers the deed cases. There is great need for a similar provision to cover the absolute devise and bequest cases, which problem does exist in Ohio.³⁶ There is a conflict in the decisions, not upon the major question whether the devisee may keep; but with respect to the person or persons for whom the constructive trust shall be imposed. The writers would favor the preparation of another section which would work a more complete consistency in result by compelling substantial restitution to the estate of the settlor in the case of an absolute devise upon oral trust. That problem, however, is not included in the present Act.

Section 12

1. Whenever a trustee shall make a contract which is within his powers as trustee, or a predecessor trustee shall have made such a contract, and a cause of action shall arise thereon, the party in whose favor the cause of action has accrued may sue the trustee in his *representative capacity*,³⁷ and any judgment rendered in such action in favor of the plaintiff shall be collectible [by execution] out of the trust property. In such an action the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

2. No judgment shall be rendered in favor of the plaintiff in

³⁵ See 40 Ohio Jur. secs. 32, 33, 87, 88, where cases are collected. See also Vanneman, "The Constructive Trust, A Neglected Remedy in Ohio, 10 Cin. L. Rev. 366, 379-385 (1936).

³⁶ *Winder v. Scholey*, 83 Ohio St. 204, 93 N.E. 1098 (1910). See 40 Ohio Jur. secs. 89-95, inclusive.

³⁷ Italics ours.

such action unless he proves that within thirty days after the beginning of such action, or within such other time as the court may fix, and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest, or in the case of a charitable trust, . . . of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to the parties to be notified at their last known addresses. The trustee shall furnish the plaintiff a list of the parties to be notified, and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary, or in the case of charitable trusts the [Attorney-General] and any corporation which is a beneficiary or agency in the performance of such charitable trust, may intervene in such action and contest the right of the plaintiff to recover.

3. The plaintiff may also hold the trustee who made the contract personally liable on such contract, if the contract does not exclude such personal liability. The addition of the word "trustee" or the words "as trustee" after the signature of a trustee to a contract shall be deemed *prima facie* evidence of an intent to exclude the trustee from personal liability.

This section, if adopted by our Legislature would affect some sweeping changes in the Ohio case-law. The Common Law courts refused to recognize the trustee in any representative capacity. An action at law against him upon any contract which he made for the trust was personal. A judgment was rendered against him personally, and execution issued against his property and, indeed, could not issue against the trust property. These Common Law rules are to be found in the Ohio cases.³⁸ The remedy which was available to the contract-creditor was subrogation in equity, a proceeding through the trustee to reach his right of exoneration, or indemnity, or perhaps,

³⁸ Vanneman, "Liability of Trust Estates for Obligations Created by the Trustee in Ohio," 9 Cin. L. Rev. 1 (1935), 40 Ohio Jur., p. 197 (1935). *Payne v. Rech*, 6 Ohio App. 327 (1917) (Trustee cannot be sued in representative capacity). *Manley v. Hunt*, 1 Ohio 258 (1824) (Execution on judgment against trustee cannot be levied on trust estate). See also *Lucht v. Behmens*, 28 Ohio St. 231 (1876) and *Trumpler v. Royer*, 18 Ohio App. 151 (1918).

more recently, his power to charge the trust estate. The extent of that right was limited to the trustee's ability to reach the trust estate.³⁹ This personal liability of the trustee, it should be observed, is not eliminated by the proposed section. On the contrary, the third paragraph of the section retains it. What the section does is to look upon the trust realistically as an economic enterprise which should itself bear the risks of its administration.⁴⁰ The courts manifest a strange unwillingness to make this change,⁴¹ and the statute, therefore, is deemed desirable in order to give to the trust estate a legal personality and to recognize the trustee in his official capacity as a distinct legal person. No longer will the state of the accounts between trustee and estate, once so vital,⁴² have significance, nor will the trustee's ability to respond in damages be a condition to reaching the trust estate. The Act does permit the trustee to exempt himself from liability by inserting an exculpatory clause in the contract. Here, too, the adoption of the statute will modify Ohio case law. By several decisions,⁴³ the rule is adopted that the addition to his signature of words such as "trustee" or "trustee for ——" is merely *descriptio personae* and does not exempt the trustee from liability. Under this section it is "deemed *prima facie* evidence of an intent to exclude the trustee from personal liability."

It is believed that Section 12 makes only such modifications as are desirable and that it should be adopted as it stands. The reasons advanced in the cases for refusing to sanction a suit against a trustee in his representative capacity, *viz.*, the desir-

³⁹ *P. C. & St. L. Ry. Co. v. Schmidt*, 8 Ohio C.C. 355 (1844). See *Stillman v. Holmes*, 9 Ohio N.P. (N.S.) 193 (1909) and *Mills v. Connor*, 104 Ohio St. 409, 135 N.E. 616 (1922).

⁴⁰ See Stone, "Liability of Trust Estates for the Contracts and Torts of the Trustees," 22 Col. L. Rev. 527 (1922); Brandeis, "Liability of Trust Estates on Contracts Made for Their Benefit," 15 Am. L. Rev. 449 (1881); Scott, "Liabilities Incurred in the Administration of Trusts," 28 Harv. L. Rev. 725 (1905) (1915); AM. LAW INSTITUTE RESTATEMENT OF TRUSTS, secs. 267-271; BOGERT, *op. cit.*, secs. 712-716.

⁴¹ See however, *Stillman v. Holmes*, note 19, *supra*.

⁴² *In re Johnson*, L. R. 15 Ch. D. 548, 552 (1880).

⁴³ 40 Ohio Jur., sec. 198.

ability of safeguarding and holding intact trust estates,⁴⁴ seem outweighed by the desirability of requiring every economic enterprise to shoulder its own risks.

Section 13

1. A trustee who has incurred personal liability for a tort committed in the administration of the trust is entitled to exoneration therefor from the trust property if he has not discharged the claim, or be reimbursed therefor out of trust funds if he has paid the claim, if (1) the tort was a common incident of the kind of business activity in which the trustee was properly engaged for the trust, or (2) although the tort was not a common incident of such activity, if neither the trustee nor any officer or employee of the trustee was guilty of personal fault in incurring the liability.

2. If a trustee commits a tort which increases the value of the trust property, he shall be entitled to exoneration or reimbursement with respect thereto to the extent of such increase in value, even though he would not otherwise be entitled to exoneration or reimbursement.

3. Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees.

There has always been some doubt respecting the trustee's right to exoneration or reimbursement for torts and there is scant authority in the cases.⁴⁵ Reimbursement for a tortfeasor seems to have been a bit difficult for the court of equity to achieve. No Ohio case setting out the rule with respect to the problem has been found. From some of the cases cited under the next section certain inferences are permissible that the right might exist. It is well, therefore, to have a clearly defined statutory rule in the state. The legislative adoption of this section would furnish a rule which meets the requirements of sound principle by a clear catalogue of the instances in which it is allowed,⁴⁶ thus properly safeguarding the estate. Intentional wrongs by the trustee would be excluded and the troublesome

⁴⁴ *Deschler v. Franklin*, 11 Ohio C. Dec. 188 (1900). (A tort case).

⁴⁵ BOGERT, *op. cit.*, sec. 734.

⁴⁶ BOGERT, *op. cit.*, p. 2174.

negligent wrongs would be included only if they were "a common incident of the kind of business activity" the trustee was properly performing. This section is far from self executing and its application will require discriminating judicial administration, but the rule appears to be well framed and workable.⁴⁷ It is consistent with the principles insisted upon in comments to the last section and makes more certain the imposition of estate liability dealt with in the following section. Furthermore it seems entirely proper, as is provided in the second subsection, that where the estate of the beneficiary is enriched by a wrong of the trustee reimbursement to the extent of the benefit conferred be permitted in any case.

Section 14

1. Where a trustee or his predecessor has incurred personal liability for a tort committed in the course of his administration, the trustee in his representative capacity may be sued and collection had from the trust property, if the court shall determine in such action that (1) the tort was a common incident of the kind of business activity in which the trustee or his predecessor was properly engaged for the trust; or (2) that, although the tort was not a common incident of such activity, neither the trustee nor his predecessor, nor any officer or employee of the trustee or his predecessor, was guilty of personal fault in incurring the liability; or (3) that, although the tort did not fall within classes (1) or (2) above, it increased the value of the trust property. If the tort is within classes (1) or (2) above, collection may be had of the full amount of damage proved; and if the tort is within class (3) above, collection may be had only to the extent of the increase in the value of the trust property.

2. In an action against the trustee in his representative capacity under this section the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

3. No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within thirty days after the begin-

⁴⁷ The comments to the Restatement of Trusts appear less liberal than the present section. It is there stated that "if the trustee was at fault in incurring the tort liability, he is not entitled to indemnity." Am. Law Inst., *op. cit.*, sec. 247, comment (d) cf. BOGERT, *op. cit.*, at p. 2175.

ning of the action, or within such other period as the court may fix and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to such beneficiaries at their last known addresses. The trustee shall furnish the plaintiff a list of such beneficiaries and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary may intervene in such action and contest the right of the plaintiff to recover.

4. The trustee may also be held personally liable for any tort committed by him, or by his agents or employees in the course of their employments, subject to the rights of exoneration or reimbursement provided in Section 13.

5. Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees.

The adoption of this section is needed to clarify the problem in Ohio. In the earliest local case tort creditors seem to be denied any recovery for their injury against the trust estate and the trustee's personal liability was conceded.⁴⁸ A reversal, without opinion, by the Supreme Court,⁴⁹ does not render the solution of the problem any simpler. Whether a suit against the trustee in his representative capacity is permissible is not clear. It seems to have been assumed in a Court of Appeals case,⁵⁰ and it is clearly possible with respect to receivers.⁵¹ This section plainly permits representative suits against the trustee by the victim of the tort and imposes liability on the trust estate. To the extent that this liability is imposed, the statute is advancing the responsibility of the property embarked upon an economic enterprise for the risks of its administration and is relieving the victim *pro tanto* of an unjust burden. By way of expansion one

⁴⁸ *Deschler v. Franklin*, 11 Ohio C. Dec. 188 (1900).

⁴⁹ 66 Ohio St. 656, 65 N.E. 1129 (1902).

⁵⁰ *Waite v. Mendenhall, et al.*, 17 Ohio App. 53 (1922).

⁵¹ *Brown v. Winterbottom*, 98 Ohio St. 127, 120 N.E. 292 (1918). See Vanneman, *op. cit.*, 9 Cin. Law Rev. 1 at pp. 16 *et seq.*

might argue that it would be sound policy to hold the economic enterprise for all wrongs done innocent victims, even including intentional wrongs of the trustee. It is obvious however that there is unity and continuity running through sections 12, 13 and 14, and it is believed that they should be considered and adopted together, preserving this unity of purpose.

II. THE TRUSTEE'S DUTY OF LOYALTY

The duty of undivided loyalty owed by a trustee to his beneficiary in the administration of the trust is a tradition in equity. It entails the most rigorous standard to be found in any jural relationship. In general the equity courts have resisted all efforts to weaken this duty by the "disintegrating erosion" of exceptions.⁵² It is thought to be good policy to continue the strictest standard in order to remove all temptation of disloyalty from the trustee. Nevertheless, trustees continue to be tempted and such abuses as are found in trust administration commonly arise from a breach of some rule imposed to secure the duty of loyalty. Thus, the commissioners, in their prefatory note to this act say, "It is felt that many of the abuses of modern trust administration have come from indirect disloyalty of the trustee and that a clear statement of the full implications of the loyalty duty might help in securing honest administration." Five sections are included in the act for this purpose.

Section 3

Except as provided in Section 4, no corporate trustee shall lend trust funds to itself or an affiliate, or to any director, officer, or employee of itself or of an affiliate; nor shall any non-corporate trustee lend trust funds to himself, or to his relative, employer, employee, partner, or other business associate.

Section 4

1. A corporate trustee which is subject to regulation and supervision by state or federal authorities may deposit with itself trust funds

⁵² *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545 (1928). See generally, Scott, *The Trustee's Duty of Loyalty*, 49 Harv. L. Rev. 521 (1936).

which are being held necessarily pending investment, distribution, or the payment of debts, provided it pays into the trust for such deposit such interest as it is required by statute to pay on uninvested trust funds, or, if there be no such statute, the same rate of interest it pays upon similar non-trust deposits, and maintains in its trust department as security for all such deposits a separate fund consisting of securities legal for trust investments and at all times equal in total market value to the amount of the deposits. But no such security shall be required to the extent that the deposit is insured or given a preference by any state or federal law.

2. The separate fund of securities shall be marked as such. Withdrawals from or additions to it may be made from time to time, as long as the required value is maintained. The income of such securities shall belong to the corporate trustee. In all statements of its financial condition published, or delivered to [the state banking department] such corporate trustee shall show as separate items the amount of trust funds which it has deposited with itself and the amount of securities which it holds as security for the payment of such deposits.

The older cases forbade a trustee, corporate or otherwise, to deposit funds with itself, or in its commercial department, and Section 3 of the new Act adopts that rule with Section 4 as an exception. The duty of loyalty required the trustee to forego all thought of selfish gain. By depositing trust funds with itself or affiliate it reaps, at least in some cases, a small advantage for itself in that it may use the funds as its own while on deposit either without payment of any interest, or a very low rate of interest. Loyalty requires that every consideration of details of administration be decided solely in the interest of the cestui que trust, and that all gains belong to the beneficiary.

Furthermore, in selecting a depository the trustee should always use the utmost care to scrutinize its soundness and responsibility. Unbiased scrutiny cannot be expected when the depository is the same person, and the depositor is in effect appraising himself. It is very significant that the American Law Institute states the rule of Section 3 without qualification.⁵³ The

⁵³ RESTATEMENT OF TRUSTS, sec. 170. Comment (m).

provision there is, "A trust company or bank which makes in its own banking department a general deposit of funds held by it as trustee thereby commits a breach of trust, since in so doing, it is dealing as an individual with itself as trustee." Following paragraphs, however, indicate that this is permitted by statute in some states. Legislative relaxations of the rules growing out of the duty of loyalty are dangerous for the reason that they are very often the result of agitation and active lobbying by the very persons upon whom the strict rule operates. This is not always true, of course. For example, in Connecticut the relaxation came through the court decision and the thorough state supervision and control of banks and trust companies was advanced by that court as justification for the change.⁵⁴

The Ohio Legislature has passed a statute dealing with this problem of deposits by a trustee with himself. General Code, Section 710-165, permits a trust company to make deposits of moneys held pending distribution or investment with itself or its own banking department.⁵⁵ In a leading case the Supreme Court held that such a deposit was a general one giving rise to a debtor-creditor relationship.⁵⁶ In 1933, subsequent to this decision, the statute was amended so as to give a preferred claim for moneys so deposited in the event of insolvency of the depository. It is submitted that an arbitrary preference by statute, when there is no requirement, and little possibility, of resorting

⁵⁴ *Hayward v. Plant*, 98 Conn. 374 (1923). See criticism 23 Col. L. Rev. 465 (1923).

⁵⁵ Sec. 710-165 was passed as part of the Banking Act in 1919 (108 Ohio L. Part I, 80, 122). In 1932, sec. 10506-45 prescribed the requirements for the deposit of funds by fiduciaries, including testamentary trustees. The last sentence of this section provides: "A corporate fiduciary authorized by law to receive deposits of fiduciaries, shall have authority to be the depository of funds held by it as such fiduciary." The purpose of this provision was apparently to complement the existing sec. 710-165. It would seem that the provision in sec. 10506-45 merely gives the authority to the corporate fiduciary to be a self-depository, and that the consequences of its being such will be governed by the preference provisions of sec. 710-165 as amended in 1933. See *Stickel v. Guardian Trust Co.*, 133 Ohio St. 472, 14 N.E. (2d) 600, 481-483 (1938).

⁵⁶ *McDonald v. Fulton*, 125 Ohio St. 507, 182 N.E. 504 (1932). See also *Stickel v. Guardian Trust Co.*, 133 Ohio St. 472 (1938).

to sound principles of tracing the trust property, is ordinarily objectionable in the interest of fairness to general creditors of the depository. In this instance, nevertheless, it has the merit of avoiding hardship under a statute which permits a limited fiduciary self-dealing and hence relaxes the corporate trustee's duty of loyalty.⁵⁷ The National Banks must, of course, conform to the Act of Congress⁵⁸ which requires, in such cases, a deposit of security somewhat similar to that specified in section 4. The proposed act is so drawn as to fit harmoniously into the state or Federal scheme, and would involve no great change in Sec. 710-165, since section 4 provides that "no such security shall be required to the extent that the deposit is . . . given a preference by any state . . . law." It is quite probable that the provisions of section 4 with respect to interest, if adopted, would be an addition to our statutory law.⁵⁹

Section 5

No trustee shall directly or indirectly buy or sell any property for the trust from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee or of an affiliate; or from or to a relative, employer, partner, or other business associate.

There can be no question about the desirability of a sweeping statutory rule respecting this problem to remove one of the greatest temptations confronting trustees. The rule as drawn in this statute is a codification of the Common law rule and embodies the rigid practice of the better class of trust companies.⁶⁰ This section, it should be observed, applies to all trustees, corporate as well as natural persons, whether they are administering testamentary or non-testamentary trusts. If adopted in this State it would be an extension to non-testamentary trustees of the same, or virtually the same, statutory restrictions now obtaining with respect to "fiduciaries," which

⁵⁷ See 31 Mich. L. Rev. 532 (1933).

⁵⁸ 12 U.S.C.A. 248 k.

⁵⁹ See Gen. Code, sec. 10506-45.

⁶⁰ See cases collected BOGERT, *op. cit.*, sec. 489; AMERICAN LAW INSTITUTE, RESTATEMENT OF TRUSTS, sec. 170, Comments (b) to (i) inclusive.

includes only testamentary trustees.⁶¹ This existing Ohio statute provides that "Fiduciaries shall not buy from or sell to themselves . . . except as expressly authorized by the instrument creating the trust and then only with the approval of the probate court in each instance; but no corporate fiduciary shall be permitted to do so, any power in the instrument creating the trust to the contrary notwithstanding." A proviso exempts authorized advancements. This very stringent section is entirely proper and its extension to non-testamentary trustees by the adoption of section 5 is desirable. No reason is perceived why trustees of living or intervivos trusts should not be governed by the same principles as testamentary trustees. Any doubt which may exist of the accountability of the former to the probate court,⁶² and thus of the applicability to them of the principle embodied in section 10506-49, would, in so far as this problem is concerned, be rendered unimportant.

It should be observed that section 17, of the Uniform Act does not permit the prohibitions of sections 3, 4, and 5 to be removed by stipulations in the trust instrument. In this respect the present Ohio law respecting fiduciaries is identical, and uniformity would be secured in the matter by the adoption of these sections.

Section 6

No trustee shall as trustee of one trust sell property to itself as trustee of another trust.

The simplest duties involved in the great principle of loyalty would preclude a trustee placing himself in the inconsistent position of being both buyer and seller. As trustee for the selling trust his duty is to get the highest price possible; as trustee for the buying trust it is to pay as small a price as possible.

⁶¹ Gen. Code, sec. 10506-49.

⁶² See 40 Ohio Jur. pp. 440, 441. See also sec. 10506-1, defining a fiduciary as a person "appointed by and accountable to the probate court" and sec. 10501-53, giving the probate court jurisdiction over "testamentary trustees." And see Ohio Constitution, Art. IV, sec. 8, setting for the jurisdiction of the probate courts.

The section must be read in connection with sections 17, 18 and 19 which make it possible to avoid its provisions in the manner there provided.

Section 7

No corporate trustee shall purchase for a trust shares of its own stock, or its bonds or other securities, or the stock, bonds or other securities of an affiliate.

Even where there is a limited power in trustees to invest in corporate stock, as in Ohio, it seems indisputable that a definite statutory limitation prohibiting the investment of trust funds in the stock of the corporate trustee or its affiliates is highly desirable. The lessons of the depression have emphasized the need of such a provision.

In Ohio corporation stocks are not legals for investment by private testamentary trustees.⁶³ The statutory list, however, is applicable only to "fiduciaries" as defined in 10506-1, *i.e.* testamentary trustees.⁶⁴ Private and corporate trustees of non-testamentary trusts are governed apparently only by the common law or other statutory provision. The Banking Act permits a much wider scope of investment to corporate trustees than the common law allowed to private trustees.⁶⁵ And these latter investments are apparently saved to corporate testamentary trustees by the statute governing "fiduciaries" through employment of the phrase "except as otherwise provided by law" in introducing the section governing a fiduciary's investment.⁶⁶ Thus, corporate trustees of both types are permitted to invest in "stocks and bonds of corporations" when authorized by their boards of directors or their executive committees.⁶⁷ This would probably not permit the investment in stocks or bonds of the

⁶³ Ohio Gen. Code, sec. 10506-41.

⁶⁴ See note 39, *supra*.

⁶⁵ Ohio Gen. Code, sec. 710-166.

⁶⁶ Sec. 10506-41. Freifield, Investments by Fiduciaries under the New Ohio Probate Code, 5 Cin. Law Rev. 429 (1931).

⁶⁷ Ohio Gen. Code, sec. 710-166, sec. 710-140b.

corporate trustee.⁶⁸ A clear statutory declaration removes all doubt and section 7 should be adopted.

It should be noted that this section is to be read in connection with Sections 17, 18, and 19, and their provisions may be avoided in the manner there provided.

III. RELAXATIONS FOR CONVENIENCE IN ADMINISTRATION.

Considerations of administrative convenience are always impinging upon strict rule and occasionally a statutory relaxation of the rule is made even though theoretically sound principle may thereby be violated. Rules of law must be capable of reasonably practical application. Section 4, previously considered, in an example which to some extent yields a principle of loyalty in the matter of trust deposits by a corporate trustee for practical business reasons.

Section 8

A trustee owning corporate stock may vote it by proxy, but shall be liable for any loss resulting to the beneficiaries from a failure to use reasonable care in deciding how to vote the stock and in voting it.

The case law on a trustee's power to indulge in proxy voting is somewhat obscure and conflicting.⁶⁹ The practice is quite common, however, and some states have legislated favorably upon the power. It seems rather clear that a trustee makes some delegation of power when he votes his stock by proxy. In most cases, however, it is not a substantial delegation of power. An Ohio case⁷⁰ requires the proxy to be accompanied by specific directions as to the voting and leaving proxy holder only a ministerial function to perform. The rule of this decision would be modified by the adoption of this section.

All of the trustees falling within the probate code, however, who hold securities, are permitted to "do all of the things which

⁶⁸ 2 Opin. Atty. Gen. 1456 (1927). 40 Ohio Jur. 390.

⁶⁹ BOGERT, *op. cit.*, p. 1778.

⁷⁰ *State ex rel Voight v. Voight*, 2 Ohio App. 145 (1913).

an individual holder might do.”⁷¹ The enumeration following in that statute, having to do with exercising and selling rights, accepting new stock in place of old, participating in reorganization, etc., is not indicated as exclusive and hence the section might be construed to include the voting by proxy. The legislature should adopt section 8 as it would supplement and not conflict with the existing statute. To remove all doubt, it is suggested that voting by proxy be added to the enumeration of General Code section 10506-44. Such amendment together with section 8 of the Uniform Act would cover the entire field of trustees.

Section 9

A trustee owning stock may hold it in the name of a nominee, without mention of the trust in the stock certificates or stock registration book; provided that (1) the trust records and all reports or accounts rendered by the trustee clearly show the ownership of the stock by the trustee and the facts regarding its holding; and (2) the nominee shall deposit with the trustee a signed statement showing the trust ownership, shall endorse the stock certificate in blank, and shall not have possession of the stock certificate or access thereto except under the immediate supervision of the trustee. The trustee shall be personally liable for any loss to the trust resulting from any act of such nominee in connection with stock so held.

This section in previous preliminary drafts of the Trust Act was much more comprehensive than the final form, in that it permitted the trustee to hold shares in his own name without in any way showing the trust. Serious objection would exist to such a broad change of the law. Recent practices by trust companies in this state⁷² and a few cases growing out of those practices show the soundness of the rules which require a clear earmarking of trust properties by the trustee,⁷³ and demonstrate

⁷¹ Ohio Gen. Code, sec. 10506-44.

⁷² See *Ullmer v. Fulton*, 129 Ohio St. 323, 195 N.E. 557 (1935); 33 Mich. L. Rev. 1118 (1935); 9 Cin. L. Rev. 490 (1935); *Arend v. Fulton*, 53 Ohio App. 503, 5 N.E. (2) 792 (1936); *Lima First Trust Co. v. Graham*, 54 Ohio App. 85, 5 Ohio Op. 232 (1932).

⁷³ BOGERT, *op. cit.*, sec. 596.

the lack of wisdom in any very substantial change relaxing the ordinary strict rules. The proposed section, however, is not a serious departure from sound principle. It only applies to the narrow case of stock taken in the name of a nominee. The provisos afford a fairly thorough safeguard to the beneficiary in that ample evidence of the trust would exist. There may be a practical need for such modification in the interest of ease of transfer. It is a way of avoiding the rather strict requirements of stock exchanges that where stock is held in the name of a fiduciary elaborate proof of the power of the fiduciary to sell must accompany the request for transfer. Under this section the trustee may, so far as exchanges are concerned, hold stock in the trust in the name of a nominee. Only those dealing in the administration of trusts wherein considerable blocks of common stocks are held will know the merits or need of this section.

Section 10

Unless it is otherwise provided by the trust instrument, or an amendment thereto, or by court order, all powers of a trustee shall be attached to the office and shall not be personal.

Powers given to trustees in trust instruments are wholly within the control of the settlor. The difficulty is that so frequently in drafting the instrument important matters such as the provision for succeeding trustees, the provision for the passing of title to them, if named or provided for, and the transmission of powers to them is overlooked entirely or done in such a manner that a law suit is necessary to settle the problems.⁷⁴ This section is designed to make all powers given in the trust instrument presumptively attach to the office instead of being personal in the trustee named. While in the usual case⁷⁵ the courts seem to indicate a presumption similar to that here provided, even where the power is discretionary, it will very much expedite the uninterrupted administration of trusts

⁷⁴ See *Reichert v. The Mo. & Ill. Coal Co.*, 231 Ill. 238 (1907).

⁷⁵ AM. LAW INST., RESTATEMENT OF TRUSTS, sec. 196; BOGERT, *op. cit.*, sec. 553.

if the succeeding trustee may rely upon a clear cut statutory rule. Under this section he may proceed with safety unless the trust instrument or a court order specifically makes the power in the original trustee personal.

So far as Ohio cases and statutes are concerned the proposed section would not be out of harmony with the existing law. In general, the Ohio cases state that the trust powers are exercisable by a successor,⁷⁶ even though discretion may be involved,⁷⁷ unless they are made peculiarly personal in the original trustee.⁷⁸

The probate code provides that a successor "fiduciary when appointed shall execute the trust to its proper termination,"⁷⁹ and that the survivor or survivors of multiple fiduciaries "shall execute the trust" unless the court or trust instrument otherwise provides.⁸⁰ These sections may fall short of making all powers adhere in the office. An adoption of section 10 would set the matter at rest so far as trustees in general are concerned and it might aid in interpreting General Code sections 10506-55 and 56 above cited. It would be advisable to amend these sections by using the same language as in section 10 thereby securing absolute clarity and uniformity.

Section 11

1. Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, any power vested in three or more trustees may be exercised by a majority of such trustees; but no trustee who has not joined in exercising a power shall be liable to the

⁷⁶ *Clark v. Neil*, 19 Ohio N.P. (N.S.) 449 (1917). (This case seems to make the power to convey attach to the office, in exact accord with the statute). *Avery v. Howard*, 7 Ohio N.P. (N.S.) 97 (1908). (Says power exercisable by successor). See 40 Ohio Jur., sec. 171, p. 431.

⁷⁷ *Sowers v. Cyrenius*, 39 Ohio St. 29 (1883). (Successor or survivor-trustee may exercise discretion to choose a charity to benefit, no intention having been shown to make such power peculiarly personal to the original trustee).

⁷⁸ *In re King*, 17 Ohio Dec. N.P. 403 (1906); *Rogers v. Rea*, 98 Ohio St. 315 (1918).

⁷⁹ Ohio Gen. Code, sec. 10506-55.

⁸⁰ Same, sec. 10506-56.

beneficiaries or to others for the consequences of such exercise, nor shall a dissenting trustee be liable for the consequences of an act in which he joins at the direction of the majority trustees, if he expressed his dissent in writing to any of his co-trustees at or before the time of such joinder.

2. Nothing in this section shall excuse a co-trustee from liability for inactivity in the administration of the trust nor for failure to attempt to prevent a breach of trust.

This section is a direct reversal of the common law rule which required multiple trustees to act jointly.⁸¹ To this common law rule there were certain exceptions. It did not apply to charitable trusts and, in the case of urgent necessity, even in private trusts it was not observed. In so far as the Ohio courts have ruled upon the question they have followed the common law.⁸²

The commissioners declared that it was intended by this section to "abolish a rule founded on the mediaeval incidents of joint tenancy." This would be a sufficient explanation if such source were the sole basis for the rule. It is believed, however, that a desire on the part of courts to further the settlor's intention and purpose in having multiple trustees had something to do with its establishment. The fact that he named more than one trustee would seem to manifest a desire on the settlor's part to secure the benefits of their combined judgment and experience. The difficulties frequently encountered in securing united action from multiple trustees have presented a practical administrative stumbling-block which is believed to outweigh the importance of safeguarding the settlor's intent in this respect. In reality the statute but shifts the burden. Under the new provision it is expressly stipulated that the settlor may require unitary action by the several trustees through affirmative provision in the trust instrument. This statutory change has been accomplished in Georgia and New Hampshire.⁸³

⁸¹ AM. LAW INST., RESTATEMENT OF TRUSTS, sec. 194, BOGERT, *op. cit.*, sec. 554.

⁸² 40 Ohio Jur. 169.

⁸³ BOGERT, *op. cit.*, sec. 554, n. 35.

An Ohio statute⁸⁴ of limited application now provides that when multiple executors are named in a will and are directed to sell land, and one or more of them dies, declines to act or neglects to execute the will, sales made by those who took upon themselves the execution of the will shall be as valid as if the others had joined.

The second paragraph is very essential to section 11 in that it eliminates the difficulty of the negligent or careless trustee which might be implicit in the main section.

Section 17

The settlor of any trust affected by this Act may, by provision in the instrument creating the trust if the trust was created by a writing, or by oral statement to the trustee at the time of the creation of the trust if the trust was created orally, or by an amendment of the trust if the settlor reserved the power to amend the trust, relieve his trustee from any or all of the duties, restrictions, and liabilities which would otherwise be imposed upon him by this Act; or alter or deny to his trustee any or all of the privileges and powers conferred upon the trustee by this Act; or add duties, restrictions, liabilities, privileges, or powers, to those imposed or granted by this Act; but no act of the settlor shall relieve a trustee from the duties, restrictions, and liabilities imposed upon him by Sections 3, 4, and 5 of this Act.

Section 18

Any beneficiary of a trust affected by this Act may, if of full legal capacity and acting upon full information, by written instrument delivered to the trustee relieve the trustee as to such beneficiary from any or all of the duties, restrictions, and liabilities which would otherwise be imposed on the trustee by this Act, except as to the duties, restrictions, and liabilities imposed by Sections 3, 4, and 5 of this Act. Any such beneficiary may release the trustee from liability to such beneficiary for past violations of any of the provisions of this Act.

Section 19

A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the duties and restrictions which would otherwise be placed upon him by

⁸⁴ Gen. Code, sec. 10504-82.

this Act, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for violations of the provisions of this Act.

It is believed that the purpose of these sections is a good one, and also that the exception of sections 3, 4, and 5 from the provisions of sections 17 and 18 is very wise. It is highly desirable to preserve the freedom of the settlor to make such provisions as meet his requirements and desires in the creation of the trust. It is equally desirable to permit a fully capable beneficiary, as the person most concerned with the successful operation of the trust, to consent to acts of his trustee in the course of the administration which may be advantageous, providing that he does so upon facts fully disclosed. That the court should have full power to permit or approve action by the trustee is fundamental. The three sections secure these *desiderata* for all parts of the Act, excepting only the requirements of sections 3, 4, and 5. For the exception of these in sections 17 and 18 there seems to be good reason. Trusts are frequently drawn on forms prepared by the trustee, particularly by the corporate trustee. When this is done clauses permitting self-dealing may not always be significant to the settlor. By way of analogy, the cases mirror abuse of the exculpatory provision by a number of corporate trustees.⁸⁵ It is useless to impose new obligations and strict prohibitions and then to permit the persons subjected thereto to stipulate them away. To point out that a settlor who is dissatisfied with such stipulations would insist that they be eliminated, and hence that his failure to object makes the provisions his own, is unconvincing. Where the trust instrument is on a form prepared by the trustee it may be executed by the unskilled settlor, who does not seek independent advice, without a full understanding of the significance of its minute provisions. Much the same point can be made regarding application by the trustee to the beneficiary for sanction of self-dealing. It is submitted that these possibilities, and not the usual course of

⁸⁵ BOGERT, *op. cit.*, sec. 542; *ibid.*, pp. 1712-1713.

scrupulous fair dealing, should weigh in favor of the salutary rule adopted by these sections. If the trustee is in any case to be relieved of the duties, restrictions and liabilities contained in sections 3, 4, and 5, it should be done by a court having supervision over the administration of the trust.⁸⁶ That this may be done is the plain inference of section 19, which deals with the power of the court to relieve the trustee and fails to list the exceptions made in the two preceding sections. It is therefore believed by the writers that these three sections should be adopted as they stand.

The penalties provided for violation of the Act are ample. Section 20 provides: "If a trustee violates any of the provisions of this Act, he may be removed and denied compensation in whole or in part; and any beneficiary, co-trustee or successor trustee may treat the violation as a breach of trust." The remaining sections, 21 to 25, deal with Uniformity of Interpretation, Short Title, Severability of sections, Repeal, and Time of Taking Effect.

The writers commend this Act to the Ohio Legislature for its careful consideration and passage in the belief that a substantial improvement in the trust law of the state will thereby be achieved.

⁸⁶ See Scott, *The Trustee's Duty of Loyalty*, 49 Harv. L. Rev. 521 (1936), at pp. 533-535; compare, *ibid.*, pp. 526-7, 536-7, 542. See also the provisions regarding permission for self dealing by private, as compared with corporate, fiduciaries in the present probate code, sec. 10506-49, referred to in the discussion of sec. 5, *supra*.